IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 4TH DECEMBER 2007 / 13TH AGRAHAYANA 1929

SA.No. 513 of 1994(C)

(AS 136/92 OF THE DISRICT COURT, KOLLAM)
(OS 386/89 OF THE MUNSIFF'S COURT, KARUNAGAPPALLY)

APPELLANTS: RESPONDENTS/DEFENDANTS

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1. JANAMMA, D/O. EASWARI, THAYYIL VADAKKATHIL KARUNAGAPPALLY MURI, KULASEKHARAPURAM VILLAGE.

2. JAGADAMMA, D/O. EASWARI, DO. DO.

3. EASWARI, W/O. KUNJU PILLAI, DO. DO.

BY ADV. SRI.P.G.PARAMESWARA PANICKER (SR.)
SRI.P.GOPAL

RESPONDENT:APPELLANT/PLAINTIFF:

NARAYANAN VIJAYAN, THAYYIL VEEDU,
KARUNAGAPPALLY MURI, KULASEKHARAPURAM VILLAGE.

BY ADV. N.VIMALAN

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 4-12-2007, THE COURT ON 04/12/2007 DELIVERED THE FOLLOWING:

M. Sasidharan Nambiar, J.

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S.A. No. 513 of 1994

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Dated this the 4th day of December, 2007

JUDGMENT

Defendants in O.S.No.386/1989 on the file of Court of the Munsiff, Karunagappally are the appellants. Plaintiff is the respondent. Respondent instituted the suit seeking a decree for injunction contending that plaint schedule property belongs to him under Ext.A1 partition deed of 1985 and appellants have no right over the plaint schedule property and they attempted to demolish the northern fence and they have no right to do so and they are to be restrained from trespassing into the property. Appellants in their written statement contended that on the western side of 19 cents of property comprised in Sy. No.15741, there was a pathway having a width of 3 feet and length of 40 feet and the said pathway was being used by them and their predecessors to reach Vavvakkavu-Pavumba road for the last more than 50 years and appellants and respondent are members of one

family and the survey numbers of the plaint schedule property and the property of appellants are the same and properties are lying contiguous and the respondent wanted to sell the property of appellants for which appellants were not prepared and respondent attempted to obstruct the pathway by putting up fence and instituted the suit suppressing true facts and existence of the pathway. Appellants raised a counter claim for mandatory injunction directing respondent to remove the fence and not to obstruct the pathway contending that they have a right of way over the C schedule pathway, which runs through the plaint schedule property and reaches the Vavvakkavu-Pavumba road. Respondent filed a rejoinder denying the claim for right of easement by prescription or by necessity over the pathway.

2. Learned Munsiff on the evidence of PWs.1 to 3, Dws.1 to 3 and Exts.A1 to A4, B1 to B3 and C1 and C2 found that plaint C schedule property was a pathway which was being used by appellants and their predecessors for more than 20 years and that was the only way available to appellants and respondent is not entitled to cause any obstruction. The suit was dismissed and a decree was granted in the

counter claim holding that appellants have a right of way along the western portion of plaint schedule property having a width of 3 ft. and a length of 40 ft. shown as C schedule in the counter claim. Respondent was directed to remove the fence put up in the C schedule pathway and appellants were permitted to remove them on his failure.

3. The respondent challenged the judgment before District Court, Kollam in A.S.No.136/82. The District Judge on re-appreciation of the evidence found that appellants failed to prove that they had easement right, either by prescription or by necessity over the plaint schedule property. Following a decision of this Court reported in Ibrahimkutty V. Abdul Rahmankunju (1992(2) KLT 775) District Judge also found that there was no precise or clear pleading with regard to the nature of easement claimed by appellants in their written statement. It was also found that there was no evidence to prove that plaint schedule property was split up from the property of the appellants and consequently property of the appellants could not be enjoyed without using the other as a way and therefore they are not entitled to a declaration of easement right either by prescription or by

necessity over the plaint C schedule property. Learned District Judge further found that there was no pleading or evidence to prove that appellants or predecessors have been using the disputed way, as of right as an easement for 20 years openly and peaceably without interruption. Judgment of the trial court was set aside and counter claim was dismissed and the suit was decreed. The above finding is under challenge in the second appeal.

4. Second appeal was admitted formulating the following substantial questions of law:-

> "Whether the first appellate court was justified in holding that the counter claim of the defendants put forward in the written statement do not disclose right of easement precisely and clearly and whether necessary pleadings constituting a right of easement of necessity and easement by prescription were pleaded and whether finding of the first appellate court on the plaint C schedule pathway is sustainable, in the light of the evidence on record."

5. Heard the learned counsel appearing for the appellants . The learned counsel vehemently argued that first appellate court went wrong in finding that there is no necessary pleadings constituting the right of way claimed. Learned counsel also argued that in paragraph 4 and 7 of the written statement necessary pleadings constituting right

of easement were pleaded. It is also argued that property of the appellants and respondent were lying in the same survey number and the property of the appellants was split up under a partition deed and appellants obtained right under B1 and B2 and therefore finding that there is no pleading on that aspect is not sustainable. It is also argued that report of the Commissioner establish that suit was field after closing the existing pathway and existence of the pathway establish that appellants have been using the plaint schedule property as a way and no other way is available to the appellants and therefore they are entitled to a right of way. The learned counsel also argued that the evidence establish that appellants and their predecessors are using the plaint C schedule pathway for the last more than 50 years and therefore they are entitled to a right of easement by prescription and the judgment of first appellate court is not justifiable.

6. As rightly found by the first appellate court, when a right of way is claimed on the basis that the appellants have that right either easement of necessity or by easement of prescription, appellants have precisely and clearly pleaded the nature of the claim. It is, therefore.

mandatory that appellants shall specifically and clearly plead the right of easement claimed by pleading the necessary ingredients constituting a right of easement. Though learned counsel argued that there are necessary pleadings, a perusal of paragraphs 4 and 7 of the written statement do not support the argument advanced. There is no pleading in paragraph 4 of the written statement to the effect that their property was split up by a partition and the properties could not be enjoyed without making use of the plaint schedule property as a way and no other way is available to the property so allotted to the predecessors in interest, appellants. The only pleading is that property originally owned by one family and the way was being used for the last 50 years. There is no pleading that there is no other way available to the property of the respondent except through the plaint schedule property, much less a pleading that when the property was split up, the property allotted to the predecessors of the appellants would not have been enjoyed without making use of the plaint schedule properties as a way. Similarly in paragraph 7 of the written statement necessary ingredients constituting a right of easement was not pleaded.

There was no pleading that the disputed way was being used by appellants peacefully and uninterruptedly. Though there is a pleading that for the last 50 years this way was being used, as rightly found by the first appellate court, ingredients of either by prescription or by necessity were pleaded.

7. If the appellants are entitled to claim a right of easement of necessity, what is to be proved was that when the property was split up from the remaining property, the properties so split up would not have been enjoyed without using the plaint schedule property as a way and there is no other way available to that property and therefore they have a right of easement. The appellants had not adduced any evidence on that crucial aspect. Therefore, finding of first appellate court that appellants are not entitled to right of easement is correct.

8. In order to substantiate the claim of right of way, there should be pleadings that appellants and predecessors have been using the plaint schedule pathway for more than 20 years and that too peacefully and without interruption. Apart from the evidence of PWs.1 to 3, which is not sufficient to prove these ingredients, no evidence was

adduced to establish these facts. The first appellate court on appreciating the evidence found that the ingredients of right of easement by prescription was also not established.

9. In the circumstances, I find no merit in the appeal. Hence, the appeal stands dismissed.

M. Sasidharan Nambiar,
Judge.

mn.

M.Sasidharan Nambiar, J.

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JUDGMENT

4th December, 2007